DATO' SERI AU BA CHI & ANOR.

v.

MALAYAN UNITED FINANCE BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CIVIL SUIT NO. 23-598-1985 & NO. 22-1020-1985]
5 AUGUST 1989

LEGAL PROFESSION: *Solicitor/client relationship - Stakeholder - Retainer by conduct - Duty between solicitor and client - Misappropriation of money.*

TORT: *Solicitor/client- Duty of care and skill - Breach - Damages to client.*

CONTRACT: *Charge - Loan in excess of RM5,000 without security - Offence under s. 20 Finance Act 1969.*

Dato Au Ba Chi (1st plaintiff) owned 51 pieces of land at Bandar Penggaram, Batu Pahat, Johor. He charged all these properties to the Malayan United Finance Bhd. (1st defendant) for a loan of RM3 million to his company known as Dato Au Development Sdn. Bhd. (2nd plaintiff). The loan was disbursed through LS Chuan & Company (2nd defendant), a firm of solicitors from the 1st defendant's panel of lawyers. It was alleged that the 2nd defendant, without the plaintiff's knowledge, released RM500,000 for the loan sum of RM3 million to Kim Hiong Realty Sdn. Bhd. (Kim Hiong) and converted the same to the use of the 1st and/or 2nd defendants.

The plaintiffs sought a declaration that the 1st defendant had wrongfully debited the plaintiffs' account and in addition the plaintiffs' claim for loss and damage due to the sale of his charged land, as ordered by the Court, upon sale by action, and the 2nd plaintiff's for the return of the RM500,000 aforesaid and interest.

Held:

[1] The 2nd defendant as stakeholder is under a duty to hold the stake *in medio* pending the future outcome of a future event, that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands. The 2nd defendant had not kept to his instruction, and has breached his undertaking and his obligation to the plaintiffs and the defendants.

[2] Under the general law the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitors invitation, the client had relied on him to do. The 2nd defendant failed to obtain full release of the RM3 million and it was this reason in breach of his duty of care and skill which was required of him and a claim in tort can be on him for breach of such duty.

[3] On relation to the claims against the 1st defendant that the 1st defendant had wrongfully debited the plaintiff account, the whole evidence has given rise to the irresistible conclusion that there had been collusion between the 1st and the 2nd defendant to defraud the plaintiffs.

[4] For these reasons, the 1st defendant is equally liable in tort and judgment would be given to both the plaintiff's as prayed.

[5] In respect of the 1st plaintiff's claim for loss and damages, no argument has been advanced during trial and arguments for these would be rescheduled after the period of appeal.

Cases referred to:
Sorrel v. Finch [1976] 2 All ER 371
Kuldip Singh v. L.L.N. [1983] 1 MLJ 257
Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1978] 3 All ER 571
Wee Hood Teck Development Corp. Bhd. v. Messrs. Yong & Co. [1983] CLJ (Rep) 940
Groom v. Crocker [1938] 2 All ER 394
Smith v. Manbi [1962] 3 All ER 857
Ross v. Caunters [1979] 3 All ER 580

Legislation referred to:
Finance Companies Act 1969, s. 20

For the plaintiffs in C.S. 22-1020-1985 - B Humfrey Ball; M/s. Wong & Paramjothy
For the plaintiffs in C.S. 23-598-1985 - Hussein B. Hj. Noor; M/s. Mah Weng Kwai & Associates
For the 1st defendants in both suits - Subra Naicker; M/s. Subra Naicker & Co.
For the 2nd defendants in both suits - E Ramasamy; M/s. E. Ramasamy & Co.

JUDGMENT

Mohd Yusoff Mohamed J:

This judgment is delayed because of my transfer to Kuala Lumpur and the dislocation of work there. I apologise for this.

The remedies sought by both plaintiffs in this consolidated action are for accounts arising from a loan granted and disbursed by the defendants.

Dato Au Ba Chi, (now referred to as 1st plaintiff), owned 51 pieces of lands at Bandar Penggaram, Batu Pahat, Johor. Descriptions of these lands are annexed to this judgment. He charged all these properties to the Malayan United Finance Bhd., (1st defendant), for a loan of RM3 Million to his company, known as Dato Au Development Sdn. Bhd., (2nd plaintiff). The loan was disbursed through L.S. Chua & Company, (2nd defendant), a firm of solicitors from the 1st defendant's panel of lawyers. It is alleged that the 2nd defendant, without the plaintiffs' knowledge, released RM500,000 from the loan sum of RM3 Million, to Kim Hiong Realty Sdn. Bhd., (Kim Hiong), and converted the same to the use of the 1st and/or 2nd defendants. In this respect a declaration is sought that the 1st defendant had wrongfully debited the plaintiffs' account with the said sum and interest as due to them from 25 June 1983.

In addition to these, the 1st plaintiff also claims for loss and damage due to the sale of his charged lands, as ordered by the Court, upon sale by public auction; and the 2nd plaintiffs for the return of the RM500,000 aforesaid and interest.

Stakeholder

The 2nd defendant was represented by Chua Lai Seng (DW4), the dominant partner of the firm, in its dealing with this loan.

Upon approval of the loan by the 1st defendant on 2 March 1983, (Exh. DBD 4-18), the 2nd defendant requested the release of the full sum of RM3 million to his firm as stakeholder. His firm's letter addressed to the 1st defendant at Exh. DBD 4-44, dated 21 June 1983, gave an undertaking to refund the whole sum in the event that legal charges of the 1st plaintiff's lands were not registered. On 25 June 1983, the 1st defendant released the money to the 2nd defendant, (Exh. DBD 4-48), as requested.

In *Sorrell v. Finch* [1976] 2 All ER 371 @ 376, Lord Denning is quoted to have defined the duties of an estate agent stakeholder, as follows:

> "as stakeholder", he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchase. He holds it as trustee for both to await the event: see *Skinner v. Trustee of the Property of Reed* [1967] 3 All ER 1286 at 1287, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank. see *Eltham v. Kingsman* [1818] 1 B & Ad 683 and *Hampden v. Walsh* [1876] 1 QBD 189.

Lord Denning's view was a dissenting Court of Appeal decision but was later upheld by the House of Lord on further appeal. Wan Hamzah J, (as he then was), accepted and applied this view in *Kuldip Singh v. L.L.N.* [1983] 1 MLJ 257, a case of almost similar nature.

Bearing these cases in mind it seems proper to accept the view that generally the duty of a stakeholder is to hold the stake *in medio* pending the future outcome of a future event; that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands. This was the position the 2nd defendant held himself out to be when the money was released to his firm.

By instructions of the 1st defendant to the 2nd defendant, (Exh. DBD 4.24), the event to occur for the disbursement of the loan was the completion of the security documentation. This was in respect of legal charges on the 1st plaintiff's land enumerated in the letter and as per annexed list upon occurrence of that event the loan was to be released in full to the 2nd plaintiffs. The 2nd defendant did not do this.

Mr. Subra Naicker, on behalf of the 1st defendant, said that the 1st defendant had kept to its terms and released the loan to the 2nd defendants, as common solicitor, for the benefit of the plaintiffs upon execution of the charge [*sic*] document in respect of 1st plaintiff's lands and after obtaining a guarantee from the 1st plaintiff's wife. It is noted, however, that the charge document, though executed by the parties concerned, was not presented for registration until 20 August 1983, (Exh. DBD 3-16), almost three months after the loan was released. It is clear that the 2nd defendant had not kept to his instructions. This also shows a flagrant disregard of s. 20 of the Finance Companies Act 1969, by the 1st defendant for providing a loan in excess of RM5,000 without security. This in itself is an offence under the Act.

Common Solicitor

The question that arose was whether the 2nd defendant was also acting for the 1st and 2nd plaintiffs as common solicitor when disbursement of the loan was made on their behalf.

There was no written retainer of the 2nd defendant by the plaintiffs. But there is no legal requirement for retainers to be in writing - *Corderey on Solicitors* 7th Edn., @ p. 50.

In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER:

> ... a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them. Page 578.

There is [*sic*] sufficient evidence to show that the conduct of the parties that intended that the relationship of solicitor and client was to continue to exist between 2nd defendant and the plaintiffs from their earlier dealings. These were:

> In November 1980 - the 2nd defendant charged the same properties belonging to the 1st plaintiff to Malayan Banking Bhd., (Exh. DBD 4-142).
>
> In September 1981 - the 2nd defendant prepared agreements for the 2nd plaintiffs. (Exh. DBD 4-6).

Between 1980 to 1983 - the relationship between the 1st plaintiff and the 2nd defendant was good and they were friends and they had other dealings together. The 2nd defendant said the 1st plaintiff had always paid his fees promptly.

For further discussion on the subject of retainer by conduct I would refer to *Wee Hood Teck Development Corp. Bhd. v. Messrs. Yong & Co.* [1983] CLJ (Rep) 940. In these circumstances, I hold that a retainer was established between the 2nd defendants and the plaintiffs.

The contractual duty between solicitors and client is as set out by Scott LJ in *Groom v. Crocker* [1938] 2 All ER 394:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

The duty derived from this retainer and imposed on the 2nd defendant, as required at Exh. DBD 4-24, was to disburse and release the loan of RM3 million in full to the 2nd plaintiffs. This was to be done upon completion of security documents.

In the event of doubt, the 2nd defendant was obliged to consult the plaintiffs and he was also obliged to keep the plaintiffs informed affecting that disbursement.

The 2nd defendant's client's account in respect of 2nd plaintiffs' transactions relating to this loan, (Exh. DBD 4-13), shows a credit sum of RM3 million as on 25 June 1983. On 27 June 1983 the account was debited with RM2,167,088.78, as payment to 2nd plaintiffs and on 30 June 1983, a further sum of RM500,000 was debited as loan to Kim Hiong. The 2nd defendant's explanation in his evidence relating to this RM500,000 is that he was instructed verbally by the 1st plaintiff to extend the loan to Kim Hiong and that, as a result of this, he wrote to the 2nd plaintiffs on 15 July 1983, (Exh. DBD 4-57), confirming the loan. In support of that contention he said, that he accounted for his loan by repayment vouchers at Exhs. DBD 4 - pp. 59, 75, 77, 78 and 88 for various sums paid to 2nd plaintiffs.

What is worthy to note is that no one from Kim Hiong Realty Sdn. Bhd. gave evidence confirming this loan to the company. The evidence of DW1, an executive officer of the 1st defendant, who had frequent dealings with Kim Hiong, states that she spoke to Tan Kay Kheng, the principal director of Kim Hiong, who denied having taken the said loan from the 2nd plaintiff (p. 121 N/E). She is a disinterested witness and, in my view, is credible.

The 1st plaintiff on the other hand denied receiving these various sums stated in the 2nd defendant's vouchers except for the sums of RM31,000 and RM150,000 in Exh. DBD 4-76 & 59, and some other payments which, he said, were payments for different purposes. However, he alleged that the vouchers at Exh. DBD 4 - pp. 75, 77, 78 and 88 were forged. He pointed to another set of vouchers at Exhs. DBD 5 @ pp. 48, 49, 50 & 51, also prepared by the 2nd defendant, showing payments for similar sums to him, but not stated there, for what purpose the payments were made. He denied that the signatures appearing on these two sets of vouchers were his.

No expert evidence was adduced on this allegation and it was therefore incumbent on the Court to compare these signatures. On comparison of the 1st plaintiff's signature on those exhibits with his usual signature at Exh. DBD 4 @ pp. 59 & 76, and on other documents in the bundle of exhibits, it is apparent that these signatures do not appear to be similar. In my view and in all probability the 1st plaintiffs' denial they were not his, is true.

Whether 2nd defendant's obligation discharged

As solicitor the 2nd defendant's obligation to the:

(a) 1st defendant, as express in the instruction @ DBD 4-24, was to prepare documentations including legal charges on 1st plaintiff's properties. He was to have them executed, presented and registered in order to secure the 2nd plaintiff's loan; and

(b) to both the plaintiffs he contracted, upon completion of these security documentations to release the RM3 million in full to 2nd plaintiffs.

As shown in Exh. DBD 3-16 : those documentations were completed on 20 August 1983. As of that date the 2nd defendant's obligation to the 1st defendant was discharged but not his obligation to the plaintiffs. By that date only a sum of RM2,167,088.78, as shown in his account at Exh. DBD 4-13, was paid to the 2nd plaintiffs. The 2nd defendant's explanation on the remaining sum was his disbursements for the following purposes:

(i) Loan to Kim Hiong RM500,000;

(ii) Release of charge of 1st plaintiff's lands from MBB Bhd. RM289,011.22;

(iii) Stamp duties and his own fees RM43,900.

The plaintiffs do not dispute disbursements at items (ii) and (iii), as within their instructions to redeem and again charge and properties to the 1st defendant, but denied that instruction was given for the loan to Kim Hiong at item (i).

The 2nd defendant's contention that the loan of RM500,000 was made on instruction of the 1st plaintiff is difficult to believe, in view of his admission and contradiction in his cross-examination. In the first instance the 2nd defendant admitted that his firm's account in respect of this loan was only notional. Next, he said that the money lent was not actually paid to Kim Hiong but it's creditors. And further, he said that the RM500,000 was transferred from the 2nd plaintiffs' account without the plaintiffs' authority. Over and above these contradictions, there is the evidence that the payment vouchers prepared by his firm respecting this loan were forged. It would appear that the explanation is frivolous but in actual fact the money was misappropriated.

Clearly, the 2nd defendant has breached his undertaking and his obligations to the plaintiffs also. He had acted for more than one client, whose interests directly conflicted with his obligations to the plaintiffs. The onus of showing that the conflicting interests did not prevent him from doing his duty to both clients rested firmly on him - see *Smith v. Manbi* [1962] 3 All ER 857 @ 859 and *Yong & Co. v. Wee Hood Tech Development Corpn.* [1984] 2 MLJ 39 @ 45 - and he failed to discharge this onus.

Liability in Tort

Under the general law the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which had had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do - see *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER 571.

One of the conditions attached to the loan approval to the plaintiffs was that the first option for end-financing to house purchasers should be given to the 1st defendant. This was referred to in the instruction to the 2nd defendant. (Exh. DBD 4-24). In that event the 2nd defendant was given the knowledge that the loan was to be utilised for the plaintiff's housing project and that full release of the RM3 million loan was important to the plaintiffs. The period of the loan was also there specified for 24 months during which time the housing project was expected to be completed. It can be concluded therefore that the plaintiffs relied on the 2nd defendant to achieve that purpose and the 2nd defendant was fully cognizant of his obligations.

The 2nd defendant failed to obtain full release of the RM3 million and was for this reason in breach of his duty of care and skill which required of him and a claim in tort can lie on him for breach of such duty.

The injury caused to the plaintiffs by the failure of the 2nd defendant in the exercise of his duty not only caused the housing project envisaged by the 2nd plaintiffs to be abandoned but it also resulted in the security in 51 pieces of lands provided by the 1st plaintiff foreclosed by the 1st defendant and placed them for auction. In any event, in an action on tort, if a duty of care is owned and the loss is directly caused by breach of that duty, reliance by the plaintiffs is irrelevant: see *Ross v. Caunters* [1979] 3 All ER 580 @ 591.

Was the 1st Defendant Liable:

The claim against the 1st defendant is that the 1st defendant had unlawfully and without consent of the plaintiffs released RM500,000 to Kim Hiong and converted the same for the use of the 1st defendant.

The evidence on this is that a sum of RM300,000 from the RM3 million stake money was paid to the 1st defendant. This is shown in the 2nd defendant's account (Exh. DBD 5-37) and his evidence (see N/E @ p. 232). The 2nd defendant explained that this was done on the instruction of Kim Hiong to settle Chuan Hin Trading Sdn. Bhd.'s (Chuan Hin), debt to the 1st defendant. The debt had arisen since 1982 in this way.

On 29 September 1982, the 2nd defendant had similarly held himself as stakeholder in the sum of RM300,000 loan granted by the 1st defendant to Chuan Hin. The loan was to be used to redeem Chuan Hin's property from Public Bank. The 2nd defendant had given his firm's undertaking to refund the money to the 1st defendant in the event that Chuan Hin could not discharge the property. The property was not discharged. However, the sum of RM300,000 was not refunded to the 1st defendant. The 2nd defendant explained that he had placed the money in fixed deposit and on 25 June 1983, he withdrew the money and gave it to Kim Hiong as payment for the purchase of lands by Chuan Hin from Kim Hiong. (Again there is no evidence from Kim Hiong to confirm this explanation as true.)

Rather than supporting his contention of honest dealing with his client's money this evidence, in my view, clearly shows that the 2nd defendant had flouted his undertaking to the 1st defendant without any compunction on his part as early as 1982. The conclusion which can be drawn from this is that the 2nd defendant had misappropriated the loan granted to Chuan Hin contrary to his duty as a stakeholder to the 1st defendant. In those circumstances, it is reasonable to infer that the 1st defendant had looked to the 2nd defendant to make good the loss suffered by the 1st defendant.

Following that unpleasant event, the 1st defendant, not heeding his past experience, released the plaintiffs' present loan to the 2nd defendant and retained him as its solicitor, ignoring the 1st plaintiff's protest. On the basis of the foregoing, the 1st defendant is not blameless for the plaintiffs' loss.

The whole evidence has given rise to the irresistable conclusion that there had been collusion between the 1st and 2nd defendants to defraud the plaintiffs.

For these reasons I find that the 1st defendant is equally liable in tort and would give judgment to both the plaintiffs as prayed. In respect of the 1st plaintiff's claim for loss and damages, no argument has been advanced during trial. I would reschedule arguments for these after the period of appeal.

Annexure to Judgment

Civil Suit No. 23-598-1985 &
C.S. NO. 22-1020-1985

Description of the Properties

(a) Lot No. 1598, Grant 20353, Bandar Penggaram Batu Pahat.

(b)

Title No. HS(D)	Lot No. PT	Title No. HS(D)	Lot No. PT
3690	1447	3691	1448
3692	1449	3693	1450
3694	1451	3701	1458
3713	1470	3714	1471
3726	1483	3729	1486
3730	1487	3737	1494
3743	1500	3744	1501
3745	1502	3746	1503
3747	1504	3748	1505
3759	1516	3762	1519
3763	1520	3766	1523
3767	1524	3770	1527
3771	1528	3779	1536
3780	1537	3781	1538
3783	1540	3791	1548
3792	1549	3793	1550
3798	1555	3802	1559
3803	1560	3810	1567
3826	1583	3827	1584
3828	1585	3829	1586
3831	1588	3854	1611
3855	1612	3857	1614
3872	1629	3875	1632
3876	1633	3877	1634
3878	1635	3879	1636

Also found at [1989] 2 CLJ 801